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No. 01-433

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION
PETITIONER,

v.

EXXON MOBIL CORPORATION, RESPONDENT.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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Exxon's Opposition Brief Highlights Why The Court Should Accept Certiorari In This Case To Decide The Proper Jury Review Role Of The Appellate Court, Which Found "No Evidence" To Support NTCA's Claim, Versus The District Court, Which Found A "Plethora" of Evidence In Support.

Exxon's brief in opposition to certiorari highlights why the Court should grant certiorari to review the proper role of the court of appeals in the review of a jury verdict. As it has throughout these proceedings (and as it induced the court of appeals to do), Exxon has paid lip service to the deference due a jury verdict only to articulate a view of the facts that does violence to that deference and the inferences supporting the verdict.

As noted in the petition for certiorari, this appeal arises from a month-long jury trial that involved numerous witnesses, extensive documentary evidence and the conflicting testimony of several expert witnesses for each side. Reviewing that evidence in the context of Exxon's motions challenging the verdict, the district court noted that NTCA produced "extensive testimony" of its expert hydrogeologist, "ample evidence of the standard of the industry for the jury," a "plethora of evidence" on proximate cause, and evidence that "the delay damages were proximately caused by the negligent actions and inactions of Exxon." App. at 13 & 16. Indeed, the trial evidence in this case was so strong that the district court submitted NTCA's punitive damage claim to the jury under District of Columbia law. See Docket Entry No. 175 to district court proceedings. The jury declined to award punitive damages, while awarding NTCA $2.5 million in compensatory damages — indicative of a thoughtful and diligent jury.

Now in this Court, Exxon seizes on the misguided review of the appellate court. In the wake of that review, NTCA's "extensive testimony" and "plethora of evidence" suddenly become "no evidence" at all. Something is wrong with Exxon's picture.

The fault lies with the *de novo* jury verdict review conducted by the appellate court at Exxon's urging. Exxon's brief in opposition to NTCA's petition is perfectly illustrative of the problems inherent in the circuit court's effort at *de novo* review. Exxon now argues in its opposing brief that NTCA converted its claim of negligence into one of strict liability because of the manner in which NTCA framed the standard of care. Opp. Br. at 8. This same flawed approach formed the circuit court's opinion. App. at 6. The circuit court's failure to follow (or cite) *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) is the means by which the court failed to give NTCA's evidence and the jury verdict the deference to which they should be entitled.

Contrary to the description of NTCA's evidence in the Exxon opposition, NTCA's proof at trial was that the applicable standard of care required Exxon's to prevent further migration of its petroleum onto NTCA's property and into NTCA's building. Indeed, the chief District of Columbia regulator testified that the regulations required Exxon to "prevent further migration of released materials, released gasoline, into the surrounding soils and groundwater." App. at 32. From among the available methodologies — such as total excavation of the Exxon site or obtaining hydrogeologic control and removal of the contaminants — Exxon selected the latter as its approach "to prevent further off-site migration, as well as eliminate residual soil hydrocarbons...." App. at 22. To obtain hydrogeologic control of its site and removal of the contaminants, Exxon itself developed the Corrective Action

Plan ("CAP"), which further specified that it would obtain hydrogeologic control of the site through a combination of "groundwater pumping" and "soil venting" techniques. Id.

NTCA's standard of care evidence did not find fault with Exxon's CAP, which was designed to protect NTCA from further injury and contamination. NTCA's evidence was however, that Exxon departed from sound and established engineering practice in implementing the CAP. NTCA's qualified hydrogeologic expert, Kent Campbell, testified that Exxon's remediation was not "carried out in a competent and professional manner consistent with good engineering practice." App. at 13 (emphasis added). To support that opinion, Campbell identified the number and placement of wells, the types of pumps, Exxon's failure to operate the SVE system in accordance with government directives, Exxon's failure to excavate and remove known contaminated soil during a tank pull at the site, and other specific acts or omissions such that the district court recognized that the evidence was "extensive" and "ample." App. at 13 & 29-31.

Exxon's new argument in its opposition brief is that NTCA's proof converted the case into one of strict liability. The appellate court — by virtue of its erroneous review of the trial record — was of the same view. App. at 6. That, however, is neither the evidence nor a fair inference from the evidence. Indeed, if Exxon's loss of hydrogeologic control had been the result of power failure, unexpected pump failure, or other similar cause, we would not be here. Instead, NTCA's proof — through its expert witness as well as the reams of documents introduced into evidence — was that Exxon's implementation of the CAP was fatally flawed, indifferent, and fell far below what good engineering practice required to prevent further off-site migration of Exxon's chemicals — the fundamental goal of the CAP and

the mandatory goal of the applicable regulations. App. at 22 & 32.

Exxon's brief, drawing on the opinion of the appellate court, does not properly review the evidence or NTCA's legal theories in the light most favorable to NTCA. Indeed, to the contrary, the appellate court and Exxon have ignored evidence in favor of NTCA and highlighted evidence supporting Exxon. This is directly contrary to Reeves and places the opinion below squarely in conflict with the rulings of this Court. See Petition at 8-12. This Court should accept certiorari in this case to clarify the role of the appellate court in reviewing a common law jury verdict in a diversity case. This case presents an appropriate opportunity for the Court to confirm that *Reeves* applies in a diversity case or that a federal court is bound to follow state law as to the sufficiency of standard of care evidence. For example, here, NTCA presented expert standard of care evidence that exceeded that required by District of Columbia law. *Cf., District of Columbia v. Mitchell*, 533 A.2d 629, 649 (D.C 1987) (opinion that medical treatment was "not ... aggressive enough" was sufficient to establish standard of care and breach).

Finally, NTCA was not afforded an opportunity to argue to the trial court that it was entitled to a new trial in the wake of the vacatur of the jury verdict. Yet, the trial court admittedly has discretion to grant a new trial. The appellate court failed to follow the teachings of *Weisgram v. Marley Co.*, 528 U.S. 440, 454-55 (2000) when it declined to remand the case in order for the trial court to exercise its new trial discretion. Exxon's opposition to certiorari highlights that in circumstances presented here — where the trial court is most familiar with the details of plaintiff's "extensive" evidence, that every presumption should be in favor of allowing the trial court to decide the new trial issue.

In view of the foregoing and for the reasons set forth in the NTCA petition, the Court should accept review in this case.

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